

1 **WO**

2  
3  
4  
5  
6  
7 **IN THE UNITED STATES DISTRICT COURT**  
8 **FOR THE DISTRICT OF ARIZONA**  
9

10 Renee Lee Miller,

11 Plaintiff,

12 v.

13 Commissioner of the Social Security  
14 Administration,

15 Defendant.

No. CV-17-02705-PHX-GMS

**ORDER**

16 Pending before the Court is claimant Renee Lee Miller's appeal of the Social  
17 Security Administration's (SSA) decision to deny disability insurance benefits and  
18 supplemental security income. (Doc. 16). For the following reasons, the Court upholds  
19 the ALJ's decision.

20 **BACKGROUND**

21 On November 25, 2013, Ms. Miller filed a claim for disability insurance benefits.  
22 She subsequently filed a claim for supplemental security income on April 9, 2014. She  
23 alleged that she suffers from various mental impairments, including epilepsy, as a result  
24 of a successfully removed brain tumor. (Tr. 34). Ms. Miller alleges a disability onset date  
25 of January 1, 2007. The claim was denied on initial review and reconsideration. (Tr. 73–  
26 74; 111–12). Ms. Miller appeared before Administrative Law Judge (ALJ) Myriam C.  
27 Fernandez Rice on January 7, 2015. (Tr. 31). In evaluating whether Ms. Miller was  
28 disabled, the ALJ undertook the five-step sequential evaluation for determining

1 disability.<sup>1</sup> (Tr. 32–33).

2 At step one, the ALJ found that Ms. Miller had not engaged in substantial gainful  
3 activity since the alleged onset date of January 1, 2007. (Tr. 34). At step two, the ALJ  
4 determined that Ms. Miller suffers from post-surgical removal of a brain tumor and  
5 associated continued seizure disorder; as well as depression, anxiety, and neurocognitive  
6 disorder. (Tr. 34). At step three, the ALJ concluded that Ms. Miller’s impairments did  
7 not meet or equal the criteria of a listed impairment in the regulations. (Tr. 34–36). At  
8 step four, the ALJ determined Ms. Miller’s residual functional capacity and found that  
9 she could perform work at all exertional levels, but with various non-exertional  
10 exceptions, such as never climbing ladders, no exposure to unprotected heights or moving  
11 machinery, and no driving. (Tr. 37). Other non-exertional limitations include performing  
12 only simple, routine, repetitive tasks and limited interaction with the public. (Tr. 37). As  
13 part of this analysis, the ALJ considered the opinion testimony of treating physicians at  
14 Banner Desert Medical Center and various consultative examining physicians and  
15 reviewing physicians. (Tr. 40–41). The ALJ then determined that Ms. Miller is not  
16 capable of performing her past relevant work as a receptionist, telemarketer, or stock

---

18 <sup>1</sup> The five-step sequential evaluation of disability is set out in 20 C.F.R.  
19 § 404.1520 (governing disability insurance benefits) and 20 C.F.R. § 416.920 (governing  
supplemental security income). Under the test:

20 A claimant must be found disabled if she proves: (1) that she  
21 is not presently engaged in a substantial gainful activity[,] (2)  
22 that her disability is severe, and (3) that her impairment meets  
23 or equals one of the specific impairments described in the  
24 regulations. If the impairment does not meet or equal one of  
25 the specific impairments described in the regulations, the  
26 claimant can still establish a prima facie case of disability by  
27 proving at step four that in addition to the first two  
requirements, she is not able to perform any work that she has  
done in the past. Once the claimant establishes a prima facie  
case, the burden of proof shifts to the agency at step five to  
demonstrate that the claimant can perform a significant  
number of other jobs in the national economy. This step-five  
determination is made on the basis of four factors: the  
claimant’s residual functional capacity, age, work experience  
and education.

28 *Hoopai v. Astrue*, 499 F.3d 1071, 1074–75 (9th Cir. 2007) (internal quotation  
marks and citations omitted).

1 clerk, but she could perform work that is available in the national economy, such as  
2 kitchen helper, industrial cleaner, and automobile detailer. (Tr. 42). Accordingly, the  
3 ALJ determined that Ms. Miller does not qualify for disability benefits. (Tr. 44).

4 The Social Security Administration Appeals Council denied Ms. Miller's request  
5 for review. (Tr. 1). She filed this complaint on August 10, 2017 to seek judicial review  
6 pursuant to 42 U.S.C. § 405(g).

## 7 DISCUSSION

### 8 I. Legal Standard

9 A reviewing federal court will only address the issues raised by the claimant in the  
10 appeal from the ALJ's decision. *See Lewis v. Apfel*, 236 F.3d 503, 517 n.13 (9th Cir.  
11 2001). A federal court may set aside a denial of disability benefits only if that denial is  
12 either unsupported by substantial evidence or based on legal error. *Thomas v. Barnhart*,  
13 278 F.3d 947, 954 (9th Cir. 2002). The ALJ is responsible for resolving conflicts in  
14 testimony, determining credibility, and resolving ambiguities. *See Andrews v. Shalala*,  
15 53 F.3d 1035, 1039 (9th Cir. 1995). "When the evidence before the ALJ is subject to  
16 more than one rational interpretation, we must defer to the ALJ's conclusion." *Batson v.*  
17 *Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1198 (9th Cir. 2004). This is so because  
18 "[t]he [ALJ] and not the reviewing court must resolve conflicts in evidence, and if the  
19 evidence can support either outcome, the court may not substitute its judgment for that of  
20 the ALJ." *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992) (citations omitted). A  
21 reviewing court may draw specific and legitimate inferences from an ALJ's decision, but  
22 it cannot speculate on the ALJ's reasoning or make "post hoc rationalizations that attempt  
23 to intuit what the adjudicator may have been thinking." *Bray v. Comm'r of Soc. Sec.*, 554  
24 F.3d 1219, 1225 (9th Cir. 2009).

### 25 II. Analysis

26 Claimant presents two arguments: (1) the ALJ improperly discounted her  
27 allegations, and (2) the ALJ failed to consider the entire record in formulating her  
28 residual functional capacity.

1           **A.     Claimant’s Credibility Concerning Subjective Symptoms**

2           When a claimant alleges subjective symptoms, the ALJ must follow a two-step  
3 analysis to decide whether to credit the claimant’s testimony. First, the claimant “must  
4 produce objective medical evidence of an underlying impairment which could reasonably  
5 be expected to produce the pain or other symptoms alleged.” *Smolen v. Chater*, 80 F.3d  
6 1273, 1281 (9th Cir. 1996) (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir.  
7 1991)) (quotation marks omitted). The claimant does not need to show “that her  
8 impairment could reasonably be expected to cause the severity of the symptom she has  
9 alleged; she need only show that it could reasonably have caused some degree of the  
10 symptom.” *Smolen*, 80 F.3d at 1282. Second, if the claimant can make the showing  
11 required in the first step and the ALJ does not find any evidence of malingering, “the ALJ  
12 can reject the claimant’s testimony about the severity of her symptoms only by offering  
13 specific, clear and convincing reasons for doing so.” *Id.* at 1281.

14           The ALJ found that Claimant’s medically determinable impairments could  
15 reasonably cause the alleged symptoms, but that the record did not support Claimant’s  
16 allegations concerning the intensity and limiting effects of her condition. (Tr. 38). The  
17 ALJ generally discredited Claimant because she successfully managed seizures by taking  
18 Keppra and Lamictal, and she managed anxiety with Xanax; the objective medical  
19 evidence and medical record indicate that Claimant went through months at a time  
20 without suffering a seizure; Claimant’s daily activities, such as driving, caring for her  
21 children, working for her sister-in-law’s business, and attending family functions, are  
22 inconsistent with the alleged limitations; and otherwise minimal evidence to support her  
23 claims of depression and anxiety. (Tr. 38–40). Claimant objects to the ALJ’s analysis of  
24 her activities of daily living, her part-time work for her sister-in-law, and the objective  
25 medical evidence.

26           **1.     Activities of Daily Living**

27           Claimant argues that the ALJ improperly considered her activities of daily living  
28 and that they do not establish that Claimant can work full-time. But the ALJ did not find

1 that the Claimant's activities of daily living were dispositive of the claim. Rather, the  
2 ALJ found that they demonstrated the Claimant is "not limited to the extent one would  
3 expect given the complaints of disabling symptoms and limitations." (Tr. 39). Instead, the  
4 "physical and mental capabilities requisite to performing many of the [activities of daily  
5 living] as well as the social interactions replicate those necessary for obtaining and  
6 maintaining employment." (Tr. 39–40). ALJs may consider claimants' activities of daily  
7 living. *See Burch v. Barnhart*, 400 F.3d 676, 680–81 (9th Cir. 2005) (holding that the  
8 ALJ was permitted to consider the claimant's daily living activities of cooking, cleaning,  
9 shopping, interacting with family, and managing finances); *Morgan v. Comm'r of Soc.*  
10 *Sec. Admin.*, 169 F.3d 595, 600 (9th 1999) ("If a clamant is able to spend a substantial  
11 part of his day engaged in pursuits involving the performance of physical functions that  
12 are transferable to a work setting [here, fixing meals, doing laundry and yard work, and  
13 caring for a friend's child], a specific finding as to this fact may be sufficient to discredit  
14 a claimant's allegations."). The ALJ properly weighed Claimant's activities of daily  
15 living. These considerations were not dispositive, but were a piece of evidence tending to  
16 show that the Claimant was not as disabled as alleged.

## 17                   **2.     Part-Time Work**

18           Claimant also objects to the ALJ's consideration of her part-time work for her  
19 sister-in-law. Claimant asserts that the ALJ erred by failing to consider that she had been  
20 forced to reduce her hours, quit the job, and take frequent breaks while at work.  
21 Claimant's earnings record demonstrated that she worked from 2008–2015 in a part-time  
22 capacity. (Tr. 34). Claimant testified at the hearing that she last worked in April 2016.  
23 (Tr. 56). The ALJ noted that "[a]lthough that work activity did not constitute  
24 disqualifying substantial gainful activity, it does indicate that the claimant's daily  
25 activities have, at least at times, been somewhat greater than the claimant has generally  
26 reported." (Tr. 40). Where "a claimant tried to work for a short period of time and,  
27 because of his impairments, *failed*, . . . actually *supported* his allegations of disabling  
28 pain." *Lingenfelter v. Astrue*, 504 F.3d 1028, 1038–40 (9th Cir. 2007) (finding that the

1 claimant's attempt to work for nine weeks was not a clear and convincing reason to find  
2 the alleged symptoms not credible). Claimant's situation is difficult, however. Claimant  
3 worked for almost eight years past her disability onset date. As the ALJ noted, this work  
4 did not constitute substantial gainful activity. But, the ALJ did not err in considering  
5 Claimant's lengthy post-disability onset work history in determining that Claimant's  
6 abilities are somewhat greater than she has reported.

### 7 **3. Objective Medical Evidence**

8 Finally, Claimant argues that the ALJ erred in finding that the medical evidence  
9 does not support Claimant's allegations of the frequency of her seizures. The ALJ found  
10 that Claimant suffered only a handful of seizures over the last eight years: a seizure in  
11 February 2011, preceded by a reduction in her medication; a seizure in July 2011,  
12 preceded by drinking eight beers the night before; and, a report in September 2014 that  
13 she was suffering 1–2 seizures a week after a lapse in care. (Tr. 38). Claimant generally  
14 argues that the ALJ failed to differentiate between “seizures” and “pseudoseizures.”  
15 (Doc. 16, pp. 13–14). At steps one through four of the sequential evaluation, the claimant  
16 maintains the burden of proof to prove disability. *Bustamante v. Massanari*, 262 F.3d  
17 949, 954 (9th Cir. 2001). Moreover, Claimant did not refer to “pseudoseizures” during  
18 the hearing in front of the ALJ. Claimant and her representative referred to them as  
19 “partial seizures” and described them as lasting 30 seconds to a minute and a half, in  
20 which Claimant is aware of what is going on but can't talk and stutters. (Tr. 58).  
21 Claimant's brief identifies only minimal evidence of pseudoseizures. Claimant identifies  
22 a note from Dr. David C. Izenberg stating: “Please excuse Renee Miller from jury duty as  
23 she suffers from panic disorder and anxiety. She also suffers from pseudoseizures and is  
24 unable to serve as a juror.” (Doc. 434). A consultative examiner, Dr. Gary M. Reyes,  
25 wrote a report noting that Claimant “stated that she has been experiencing ‘pseudo-  
26 seizures’/panic attacks since 2012 averaging once a week” and that Claimant “described  
27 her symptoms as ‘can't speak, loose motor control, can't move arms, body jerks to one  
28 side.” (Tr. 512–13). Claimant bears the burden of establishing her severe impairments

1 and their impact on her residual functional capacity, and Claimant's scant evidence of  
2 pseudoseizures does not meet that burden. The ALJ did not err in finding that the  
3 objective medical evidence conflicts with Claimant's testimony.

4 As for Claimant's regular seizures, "[i]mpairments that can be controlled  
5 effectively with medication are not disabling for the purpose of determining eligibility for  
6 SSI benefits." *Warre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir.  
7 2006). And, an ALJ may discredit claimant's testimony with evidence of conservative  
8 treatment. *Parra v. Astrue*, 481 F.3d 742, 751 (9th Cir. 2007) ("[E]vidence of  
9 'conservative treatment' is sufficient to discount a claimant's testimony regarding  
10 severity of an impairment."). As referenced by the ALJ, Ms. Miller told her physician in  
11 2011 that "she did not have seizure after taking Keppra" and she had been seizure free  
12 since maintaining her dosage. (Tr. 787). In 2014, although she reported additional  
13 seizures, that had been preceded by a lapse in care. The ALJ did not err in determining  
14 that Claimant's allegations of the frequency of her seizures are not supported by the  
15 medical record.

#### 16 **B. Residual Functional Capacity**

17 The ALJ determined that Claimant had severe impairments, but that they did not  
18 meet or medically equal a listed impairment. (Tr. 34). When an impairment does not meet  
19 or equal a listed impairment, the ALJ must make a finding about the claimant's residual  
20 functional capacity. The RFC is then used at steps four and five of the sequential process  
21 to determine whether the claimant can return to past relevant work or adjust to other work  
22 in the national economy. 20 C.F.R. § 404.1520(e). A claimant's RFC "is the most [the  
23 claimant] can still do despite [the claimant's] limitations." *Id.* at § 404.1545(a)(1). In  
24 assessing an RFC, ALJs must consider "all of [the claimant's] medically determinable  
25 impairments." *Id.* at § 404.1545(a)(2). Here, the ALJ determined that Claimant could  
26 perform work at all exertional levels, but should never climb ladders, should avoid even  
27 occasional exposure to unprotected heights and moving machinery, and should not drive.  
28 (Tr. 37). The ALJ also found that Claimant can perform simple routine repetitive tasks,

1 with only occasional changes in work setting and limited interaction with the public. *Id.*  
2 Claimant argues that the ALJ failed to account for limitations caused by her deficiencies  
3 in maintaining concentration, persistence, and pace, social limitations, and fatigue and  
4 headaches.

### 5 **1. Concentration, Persistence, and Pace**

6 In evaluating whether Claimant's impairments qualified as a listing impairment,  
7 the ALJ evaluated Claimant's mental impairments. To meet the "paragraph B" criteria, a  
8 claimant must show that their mental impairment or impairments result in two of the  
9 following: "marked restriction of activities of daily living; marked difficulties in  
10 maintaining social functioning; marked difficulties in maintaining concentration,  
11 persistence, or pace; or repeated episodes of decompensation." (Tr. 35). The ALJ found  
12 that Claimant had moderate restrictions with regard to concentration, persistence, and  
13 pace. (Tr. 36). The ALJ noted that state agency consultants believed Claimant to have  
14 moderate restrictions, but that Claimant testified to her ability to pay bills, use a  
15 checkbook, drive, and use a computer. *Id.* This analysis is not an RFC determination. The  
16 ALJ accounted for Claimant's limitations by limiting Claimant to a job that requires only  
17 the performance of simple, routine, and repetitive tasks. (Tr. 37). Although limiting a  
18 claimant to unskilled work does not necessarily account for a claimant's impairments in  
19 concentration, persistence, and pace, here, the ALJ based this determination on  
20 Claimant's testimony about her daily activities and work history. *See Stubbs-Danielson v.*  
21 *Astrue*, 539 F.3d 1169, 1174 (9th Cir. 2008) ("[A]n ALJ's assessment of a claimant  
22 adequately captures restrictions related to concentration, persistence, or pace where the  
23 assessment is consistent with restrictions identified in the medical testimony.").  
24 Similarly, the state agency examiners relied on by the ALJ assess that Claimant was not  
25 significantly limited in the ability to carry out short and simple instructions and that she  
26 was capable of competitive, remunerative unskilled work. (Tr. 106–08; 143–45).

27 Claimant argues that the fact that the ALJ asked the Vocational Expert ("VE") a  
28 hypothetical involving off-task time evidences that the ALJ did not equate simple,



1 repetitive work with concentration, persistence, and pace accommodations. ALJs must  
2 ask VEs hypothetical questions that “set out all of the claimant’s impairment’s” and are  
3 based on “evidence appearing in the record, whether it is disputed or not.” *Gallant v.*  
4 *Heckler*, 753 F.2d 1450, 1456 (9th Cir. 1984) (internal quotations omitted). The  
5 Claimant’s testimony alleged that she often needed to take breaks. Although the ALJ  
6 ultimately discredited Claimant’s testimony, the fact that the ALJ asked questions of the  
7 VE related to Claimant’s possible impairments does not establish that the ALJ improperly  
8 formulated the RFC. Claimant also asserts that other physicians’ opinions support a  
9 contrary finding with regards to Claimant’s ability to work in spite of her impairments of  
10 concentration, persistence, and pace. Claimant notes that Dr. Reyes’s consultative report  
11 supports a finding that she has limitations in her ability to maintain attention and  
12 concentration. Dr. Reyes’s report does note that her testing “would appear to suggest  
13 some limitations in her ability to maintain attention and concentration.” (Tr. 522). But  
14 this is not inconsistent with the ALJ’s findings. Claimant also states that a different  
15 consultative examiner, Dr. James E. Huddleston, found that Claimant is moderately  
16 impaired in her concentration and persistence but “can likely carry out noncomplex  
17 instructions and sustain a routine without special supervision.” (Tr. 335). Claimant argues  
18 that during her examination with Dr. Huddleston, she had to restart some tests due to  
19 anxiety. Claimant appears to suggest that the ALJ and the Court should use this fact to  
20 override Dr. Huddleston’s conclusion that Claimant can carry out routine tasks. This is  
21 not the Court’s role. Finally, Claimant argues that the state agency examiners opinions  
22 should be given little weight due to their reliance on flawed understandings of Claimant’s  
23 daily activities and work history. For the reasons stated above in the Court’s examination  
24 of Claimant’s credibility, the state agency examiners could reasonably rely on Claimant’s  
25 daily activities and work history.

## 26                   **2.     Social Functioning**

27           Claimant asserts that the RFC fails to account for her restrictions in social  
28 functioning. The ALJ fashioned an RFC that restricted Claimant to limited interactions

1 with the public. Claimant argues, however, that her social limitations apply to all types of  
2 people and that she would also have difficulty interacting with coworkers and  
3 supervisors. In evaluating the Claimant's social functioning, the ALJ found that Claimant  
4 had only mild difficulties. (Tr. 35). The ALJ noted that Claimant goes to family  
5 functions, leaves her home daily, goes shopping, and maintains a relationship with her  
6 boyfriend. *Id.* The ALJ also cited the state agency examiners' evaluations that Claimant  
7 had mild restrictions in social functioning. Claimant points to Dr. Reyes's opinion that  
8 Claimant's impairments "would appear to suggest some limitations in her ability to get  
9 along with coworkers, respond appropriately [to] supervision or maintain socially  
10 appropriate behavior." (Tr. 522). Claimant also notes that the state agency examiners'  
11 said she could "[r]espond appropriately to supervisors, co-workers, and social intercourse  
12 in the workplace, when interactions are limited in frequency, duration, and scope." (Tr.  
13 108). "Where evidence is susceptible to more than one rational interpretation, it is the  
14 ALJ's conclusion that must be upheld." *Burch*, 400 F.3d at 679.

### 15 **3. Headaches and Fatigue**

16 Claimant argues that the ALJ erred by failing to consider her complaints of fatigue  
17 and intermittent headaches. Claimant has not cited any medical providers' opinions that  
18 the fatigue or headaches would impact Claimant's ability to work. Claimant also does not  
19 cite to any of her testimony before the ALJ that identified headaches or fatigue as a  
20 serious symptom affecting her ability to function and work. Moreover some of the  
21 medical records cited by Claimant do not support the conclusion that the headaches and  
22 fatigue are debilitating. Doctors' records note: "[m]ild headaches intermittently" and  
23 "some mild fatigue." (Tr. 362, 367, 374, 376, 377, 470, 618). Another provider reports  
24 that Claimant reported no headaches and no fatigue, but assessed the presence of fatigue.  
25 (Tr. 573, 578). Claimant was instructed to lie in a dark room and place a cool compress  
26 on her head to treat headaches. (Tr. 583). Reports of intermittent mild headaches and  
27 mild fatigue are insufficient to meet Claimant's burden of establishing that these are  
28 impairments that affect her ability to function. Further, Claimant appears to have only

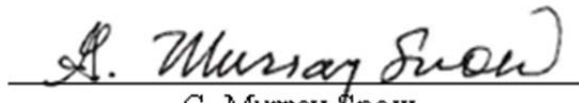
1 been told to lie down and has not been prescribed medication or undergone subsequent  
2 testing relation to her headaches. Evidence of “conservative treatment is sufficient to  
3 discount a claimant’s testimony regarding severity of an impairment.” *Parra*, 481 F.3d at  
4 751.

### 5 **CONCLUSION**

6 The ALJ properly weighed Claimant’s credibility, considering her activities of  
7 daily living, work history, and the objective medical evidence, in conjunction with other  
8 considerations. Claimant’s citations to evidence of pseudoseizures is minimal and the  
9 ALJ did not err in determining that there was not medical evidence to support her claims.  
10 The ALJ also properly fashioned the RFC. The ALJ took into account Claimant’s  
11 moderate limitations in concentration, persistence, and pace. The ALJ’s determination  
12 that Claimant only had mild limitations in social functioning was reasonable. Claimant  
13 did not meet her burden of proof to establish that headaches and fatigue were  
14 significantly prevalent impairments that needed to be accounted for in the RFC.

15 **IT IS THEREFORE ORDERED** that the ALJ’s decision to deny disability  
16 benefits and supplemental security income is affirmed. The Clerk of Court is directed to  
17 enter judgment accordingly.

18 Dated this 6th day of September, 2018.

19  
20   
21 G. Murray Snow  
22 Chief United States District Judge  
23  
24  
25  
26  
27  
28